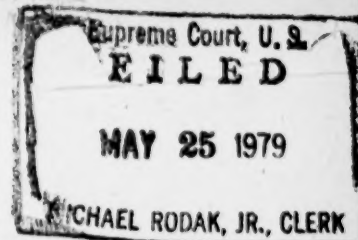


No. 78-1635



In the Supreme Court of the United States

OCTOBER TERM, 1978

TIVIAN LABORATORIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT**

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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The petition for a writ of certiorari was filed out of time. The judgment of the court of appeals was entered on December 20, 1978 (Pet. App. 10). A petition for rehearing was received by the clerk of the court of appeals on January 3, 1979. If filed, this petition would have been timely under Fed. R. App. P. 40. But the petition was not accepted for filing; it was returned to petitioner's counsel by the clerk of the court of appeals on the day it was received (App., *infra*) because the petition did not contain an introductory statement required by Rule 15 of the Rules of the United States Court of Appeals for the

First Circuit.¹ No corrected petition for rehearing was ever filed.² Accordingly, the mandate of the court of appeals issued as scheduled on January 10, 1979 (Pet. Sep. App. A-11 to A-13).³

The time for filing a petition for certiorari was not extended. Accordingly, the 90-day period provided in 28 U.S.C. 2101(c) expired on March 20, 1979, 90 days after the date of entry of the court of appeals' judgment. The petition for a writ of certiorari was filed April 4.⁴

¹Rule 15 provides:

A petition for rehearing shall contain an introductory statement that the argument or matter was not presented before, together with an explanation why it was not. In the absence of such a statement, the Clerk is directed not to accept the petition, and to return it to counsel, referring to this Rule.

²Contrary to the petitioner's representation (Pet. 4), no petition for rehearing was denied on January 22, 1979, or on any other date.

³"Pet. Sep. App." refers to the separately bound appendix to the petition for a writ of certiorari.

⁴The copies of the petition tendered on April 4 were returned to counsel for reprinting. The reprinted petition was received on April 26, and the Clerk dated it April 4. See Rule 39(4) of the Rules of this Court.

In addition to the events described above, on April 4, 1979, petitioner sent to the clerk of the court of appeals a telegram purporting to be a motion to stay that court's "enforcement order December 20, 1978 pending ruling on written petitions for rehearing" (see Pet. Sep. App. A-8 to A-10). The application was received and filed by the clerk on April 5, 1979, and was denied that day by order of the court, signed by the clerk (Pet. Sep. App. A-8 to A10).

On April 13, petitioner filed a "Petition for Stay of EPA Enforcement Order," which was presented to Mr. Justice Brennan, and denied by him on April 16.

The tender of a defective petition for rehearing, returned by the court of appeals, does not toll the running of the 90-day period. See *Bowman v. Loperena*, 311 U.S. 262, 266 (1940); *Morse v. United States*, 270 U.S. 151, 154 (1926); see also *Pfister v. Northern Illinois Finance Corp.*, 317 U.S. 144, 149-151 (1942); *Department of Banking v. Pink*, 317 U.S. 264, 266 (1942). Thus, the refusal to accept the tendered petition for rehearing on January 3 does not constitute a denial of rehearing for purposes of fixing the time within which to file a petition for a writ of certiorari. Even if it did, moreover, the result would be the same. The 90-day period of 28 U.S.C. 2101(c) would have expired on April 3, so that the petition filed on April 4 was untimely in any event.

The time limit imposed by 28 U.S.C. 2101(c) is jurisdictional. *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 417-418 (1923).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MAY 1979

DOJ-1979-03

1a

APPENDIX

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

1606 JOHN W. MCCORMACK
POST OFFICE AND COURTHOUSE
BOSTON MASS. 02109
(617) 223-2888

DANA H. GALLUP
CLERK

January 3, 1979

Richard K. Foster, Esquire
Pole 121 Great Road
Lincoln, Rhode Island 02865

Re: *No. 78-1109. United States v.
Tivian Laboratories, Inc.*

Dear Mr. Foster:

Your Petition for Rehearing was received today—the last day for filing. However, there is no introductory statement as required by Local Rule 15.

You are reminded of the provision in that Rule stating "In the absence of such a statement, the Clerk is directed not to accept the petition for filing, and to return it to counsel, referring to this Rule."

2a

In view of the above, I return herewith to you your
tendered Petition for Rehearing and copies thereof, in
accordance with Local Rule 15.

Sincerely yours,

/s/ Dana H. Gallup

DANA H. GALLUP
Clerk

DHG:lac
Enclosures

cc: Everett C. Sammartino, Esquire
Assistant U.S. Attorney
P.O. Box 1401
Providence, Rhode Island